IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 584

COMMERCIAL MOLASSES CORPORATION,

Petitioner,

vs.

NEW YORK TANK BARGE CORPORATION, as Chartered Owner of the Tank Barge "T. N. No. 73",

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

T. CATESBY JONES,
Counsel for Petitioner.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Commercial Molasses Corporation, respectfully presents this, its petition for rehearing in the above entitled cause or, in the alternative, its application under General Rule XXXIII of this Court for an extension of time within which to file a petition for rehearing in this Honorable Court in the above entitled cause and, in support thereof, presents the following:

Introduction

Your petitioner, the owner of a cargo of molasses which was laden on board the tank barge "T. N. No. 73" and which sustained serious damage as the result of the sinking

of that barge in the slip at Pier 1, Hoboken, New Jersey, on October 24, 1937, filed its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit and brief in support thereof with this Court on November 20, 1940 (R. 299). Said petition was granted by order of this Court filed December 16, 1940 (R. 299). Thereafter, briefs having been filed by both parties, oral argument was heard by this Court on March 14th and 15th, 1941. On April 14, 1941, this Court entered herein an order reading "Per Curiam: The judgment is affirmed by an equally divided court."

The Questions Involved in This Case and the Grounds for Rehearing or for an Extension of Time

This case presents for decision two separate and distinct questions of law of general interest to all persons engaged in carrying, insuring and dealing in cargoes carried by water. Both are of fundamental importance and, we respectfully submit, should be authoritatively decided by this Court to insure the proper and uniform interpretation of the admiralty law by the Federal Courts in the various Circuits. We assume that the writ of certiorari was granted to accomplish that purpose.

The first of the two fundamental points of law here involved concerns the question as to the scope of, and the effect to be given to, the presumption of unseaworthiness which has long been recognized to arise when a vessel sinks in smooth water without adequate external cause. The Circuit Court of Appeals for the Second Circuit in the case at bar recognized the existence of this presumption, but held that it was not a continuing presumption and was not sufficient to justify a decree in favor of a cargo owner in an action based upon the breach of the shipowner's express warranty of seaworthiness even though the shipowner had failed to adduce satisfactory proof even to enable the Trial Court to find as a fact that the shipowner's attempted or suggested explanation actually existed. In so holding, the Circuit Court of Appeals reversed the ruling of the District

Court. The effect of its decision "by approving resort to mere conjecture as to the cause of the" sinking operated to "relax the important and salutary rule in respect of seaworthiness" (*The Edwin I. Morrison*, 153 U. S. 199, 215), a rule long recognized and enforced by the admiralty courts of both England and this country. As pointed out both in our brief in support of our petition for certiorari (pp. 18-26) and in our subsequent brief on the hearing by this Court (pp. 27-35), this ruling by the Circuit Court of Appeals for the Second Circuit was in square conflict with decisions of the Circuit Courts of Appeals for the Third, Fourth, Fifth and Ninth Circuits. See in particular *S. C. Loveland Co.* v. *Bethlehem Steel Co.*, 33 F. (2d) 655 (C. C. A. 3rd), where the legal situation was identical with that which existed here.

The second of the two separate and distinct points of law presented in this case (it was designated in the petition for a writ of certiorari herein as No. 4 of "The Questions Presented in the Petition"—Petition p. 10) is whether a charter party provision to the effect that the cargo owner shall insure the goods for the account of the carrier and that the vessel shall not be liable for any loss in respect of which insurance has been or could have been effected operates to cancel an express and unconditional warranty of seaworthiness contained in the same charter party. The District Court, although ruling that the loss was due to unseaworthiness, held that the vessel owner was excused by such a clause from liability for such loss. The Circuit Court of Appeals for the reasons stated in its opinion did not rule upon this point (R. 297). The importance of this question is, however, manifest. The decision herein on this question is in conflict with the general principles laid down in prior decisions of this Court (see particularly *Cullen Fuel Co.* v. *W. E. Hedger, Inc.*, 290 U. S. 82, 88; *The Carib Prince*, 170 U. S. 655, 659; *The Caledonia*, 157 U. S. 124, 137) and with rulings in other Circuits (see particularly *The Framlington Court* (C. C. A. 5), 69 F. (2d) 300, 303-4). It is also directly contrary to the ruling of the House of Lords in

Nelson Line, Ltd. v. *James Nelson & Sons, Ltd.*, 1908 A. C. 16, affirming (1907) 1 K. B. 769 (C. A.).

We respectfully submit that, if the case is left as it now stands, it will be the source of great confusion.

The District Court, although it held that the vessel owner was liable for the loss of your petitioner's cargo caused by the vessel's sinking due to unseaworthiness, exonerated it from all liability (R. 265) because of the terms of the insurance clause in the charter party. The Circuit Court of Appeals affirmed the decree of the District Court (R. 297), but did so on the sole and specific ground that the presumption of unseaworthiness did not suffice to establish that the loss had been caused by the vessel's unseaworthiness. The *per curiam* order of this Court, dated April 14, 1941, merely provides that "the judgment is affirmed by an evenly divided court."

Obviously, on the two important questions of law presented by the case, a conflict of law between the various Circuits continues to exist. The importance of settling conflicts between the Circuits has been emphasized by this Court in its Rule 38, Sec. 5 b. That the principle underlying this rule is particularly applicable to the Maritime Law is illustrated by the following decisions of this Court: *The Lottawanna*, 21 Wall. 558; *Queen Ins. Co.* v. *Globe & Rutgers Ins. Co.*, 263 U. S. 487; *Knickerbocker Ins. Co.* v. *Stewart*, 253 U. S. 149, 160; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *The Thomas Barlum*, 293 U. S. 15, 43, 44 and the cases there cited.

When a new Justice has been appointed to fill the vacancy now existing on this Court, a decision can be made which will authoritatively state the views of this Court on the two points of law here involved, and thus put an end to the present conflict between the various Circuits.

Wherefore, your petitioner respectfully prays that its petition for a rehearing be granted and that the judgment of the Circuit Court of Appeals for the Second Circuit be, upon further consideration, reversed or, in the alternative,

that the time within which a petition for rehearing in the above entitled cause may be filed in this Honorable Court be extended to and including a period two weeks subsequent to the filling of the vacancy now existing in this Court.

Respectfully submitted,

T. Catesby Jones,
Counsel for Commercial Molasses Corporation, Petitioner.

Certificate of Counsel

I, T. Catesby Jones, counsel for the above-named petitioner, do hereby certify that the foregoing petition and application is presented in good faith and not for delay.

T. Catesby Jones,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1941.

Commercial Molasses Corporation, Petitioner, vs. New York Tank Barge Corporation, as Chartered Owner of the Tank Barge "T. N. No. 73".	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 17, 1941.]

Mr. Chief Justice Stone delivered the opinion of the Court.

This is a proceeding in admiralty originating in the District Court upon a petition by respondent as chartered owner of the tank barge "T.N. No. 73", for limitation of liability for damage to petitioner's shipment of molasses resulting from the sinking of the barge in New York harbor.

Petitioner, the sole claimant in the limitation proceeding, filed, in behalf of the insurer, its claim for loss of the molasses on the barge, which sank on Oct. 23, 1937, while taking on the shipment from the S. S. "Altheisultan". The barge sank in smooth water, without contact with any other vessel or external object to account for the sinking. By the contract of affreightment with petitioner's predecessor in interest, extended to cover the year 1937, respondent undertook to transport the molasses by barges in New York harbor from vessels or tidewater refineries to the shipper's customers and agreed that the barges are "tight, staunch, strong and in every way fitted for the carriage of molasses within the limits above mentioned and [respondent] will maintain the barges in such condition during the life of this contract." The contract also contained an undertaking on the part of the shipper of the molasses to effect insurance on cargoes for the account of respondent, the breach of which, it is contended, operated to relieve respondent from liability for any unseaworthiness of the barge.

The "T. N. No. 73" was a steel tank barge with four cargo tanks, two forward and two aft, separated by bulkheads, one extending fore and aft and the other athwartship. It had a rake fore and aft beginning 23 inches below the deck, affording space for fore

and aft peak tanks. The customary method of stowing the barge was to pump the molasses into the forward tanks until the barge had a specified freeboard, then into the stern tanks until the stern had another specified freeboard, then back into the forward tanks until the barge was trimmed fore and aft.

In the case of the present shipment the customary procedure was followed and the molasses was first pumped into the forward and then into the after tanks at a rate of from 3 to 3½ tons a minute. When the stern had approximately the desired freeboard the mate of the barge went forward to open the valves of the discharge pipes connecting with the forward tanks so as to fill them sufficiently to trim the barge fore and aft. On his way he stopped for a short time, the length of which was not precisely fixed, to carry on a conversation with some of the men on the vessel lying alongside. When he reached the valves for the forward tanks and before the valves for the after tanks had been closed, the barge sank by the stern. Only a small part of the molasses was saved and the value of that lost largely exceeded the value of the barge after salvage operations.

Respondent attributed the sinking to overloading of the after tanks resulting from the mate's delay in shifting the flow of the molasses from the stern to the forward tanks. If, as alleged, over-filling of the stern tanks caused the loss without the privity or knowledge of respondent, it could limit liability. R. S. § 4283, 46 U. S. C. § 183; *La Bourgogne*, 210 U. S. 95, 122; *The George W. Pratt*, 76 F. (2d) 902. But it was unnecessary to decide any question of limiting liability unless petitioner, the sole claimant, succeeded in establishing its claim.

On the issues thus presented the District Court heard a great deal of testimony by witnesses who testified to all the circumstances attending the loading and sinking of the barge, and by experts as to its theoretical load capacity and the probable disposition of its load at the time the barge sank. There was also much evidence bearing on the seaworthiness of the vessel. This included the testimony of a representative of the cargo interests who had inspected the barge just before she began to receive the molasses and had found the tanks dry and clean, and who admitted he had found no evidence of leakage. There was also testimony by a diver who had examined the barge while she was on the bottom, and of others who had examined her condition after she had been raised and placed in dry dock.

After a careful review of all the evidence the trial judge found that it was not sufficient to establish the fact that the sinking was caused by overloading the after tanks. He also found as a fact that upon all the evidence "the cause of the accident has been left in doubt". From all this he concluded that respondent was chargeable upon its warranty of seaworthiness by reason of the "presumption" of unseaworthiness arising from the unexplained sinking of the barge which would deprive the owner of the right to limit liability. But as he thought the insurance clause in the contract of affreightment required petitioner to effect cargo insurance for account of respondent, which it had failed to do, he dismissed petitioner's claim. 1939 A. M. C. 673.

The Court of Appeals affirmed, 114 F. (2d) 248, but for a different reason than that assigned by the trial judge for his decision. It held that the burden was on petitioner to prove that respondent had furnished an unseaworthy barge. The court sustained the trial court's finding which it interpreted as meaning "that the evidence whether or not the barge sank because of unseaworthiness was so evenly matched that the judge could come to no conclusion upon the issue." But it held that the "presumption of unseaworthiness", which would arise from the evidence of the sinking of the barge in smooth water without any other apparent or probable cause, did not survive the further proof which left in doubt the issue of the cause of the loss. The court accordingly held that petitioner had not sustained its burden. It thus became unnecessary to consider what burden would rest on the barge owner if he were seeking to limit liability on an admittedly valid claim. We granted certiorari, 311 U. S. 643, to resolve an alleged conflict of the decision below with those of other circuit courts of appeals. *Pacific Coast S. S. Co.* v. *Bancroft-Whitney Co.*, 94 Fed. 180; *The John Twohy*, 279 Fed. 343; *Loveland Co.* v. *Bethlehem Steel Co.*, 33 F. (2d) 655; *Gardner* v. *Dantzler Lumber & Export Co.*, 98 F. (2d) 478; cf. *The Edwin I. Morrison*, 153 U. S. 199, and because of the importance in the maritime law of the principle involved.

With respect to the burden of proof, this case is to be distinguished from those in which the burden of proving seaworthiness rests upon the vessel when it is a common carrier or has assumed the obligation of a common carrier. The present contract of affreightment was for private carriage in New York harbor: *The Fri*, 154 Fed. 333; *The G. R. Crowe*, 294 Fed. 506; *The Wild-*

enfels, 161 Fed. 864; *The C. R. Sheffer*, 249 Fed. 600; *The Lyra*, 255 Fed. 667; *The Nordhvalen*, 6 F. (2d) 883, and thus gave to respondent the status of a bailee for hire of the molasses. *Southern Ry.* v. *Prescott*, 240 U. S. 632, 640; *Kohlsaat* v. *Parkersburg & M. Sand Co.*, 266 Fed. 283; *Alpine Forwarding Co.* v. *Pennsylvania Railroad*, 60 F. (2d) 734; *Gerhard & Hey, Inc.* v. *Cattaraugus T. Co.*, 241 N. Y. 413. Cf. *The Nordhvalen*, *supra*, 887. Hence we are not concerned with the rule that one who has assumed the obligation of a common carrier can relieve himself of liability for failing to carry safely only by showing that the cause of loss was within one of the narrowly restricted exceptions which the law itself annexes to his undertaking, or for which it permits him to stipulate. The burden rests upon him to show that the loss was due to an excepted cause and that he has exercised due care to avoid it, not in consequence of his being an ordinary "bailee" but because he is a special type of bailee who has assumed the obligation of an insurer. *Schnell* v. *The Vallescura*, 293 U. S. 296, 304, and cases cited. See *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 918.

For this reason the shipowner, in order to bring himself within a permitted exception to the obligation to carry safely, whether imposed by statute or because he is a common carrier or because he has assumed it by contract, must show that the loss was due to an excepted cause and not to breach of his duty to furnish a seaworthy vessel. *The Edwin I. Morrison*, *supra*, 211; *The Majestic*, 166 U. S. 375; *Schnell* v. *The Vallescura*, *supra*; *The Beeche Dene*, 55 Fed. 525. Cf. 39 Stat. 539, 49 U. S. C. § 88; Uniform Bill of Lading Act, § 12. See IX Wigmore on Evidence (3rd ed.) § 2508 and cases cited. And in that case, since the burden is on the shipowner, he does not sustain it, and the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception. *The Folmina*, 212 U. S. 354, 363; *Schnell* v. *The Vallescura*, *supra*, 306, 307. A similar rule is applied under the Harter Act, which gives to the owner an excuse for unseaworthiness, if he has exercised due care to make his vessel seaworthy, for there the burden rests upon him to show that he has exercised such care. *The Wilderoft*, 201 U. S. 378; *The Southwark*, 191 U. S. 1, 12; *May* v. *Hamburg etc. Gesellschaft*, 290 U. S. 333, 346.

But as the court below held, the bailee of goods who has not assumed a common carrier's obligation is not an insurer. His under-

taking is to exercise due care in the protection of the goods committed to his care and to perform the obligation of his contract including the warranty of seaworthiness when he is a shipowner. In such a case the burden of proving the breach of duty or obligation rests upon him who must assert it as the ground of the recovery which he seeks. *Southern Ry.* v. *Prescott, supra; Kohlsaat* v. *Parkersburg & M. Sand Co., supra; The Transit*, 250 Fed. 71, 72, 75; *The Nordhvalen, supra; Delaware Dredging Co.* v. *Graham*, 43 F. (2d) 852, 854; *Alpine Forwarding Co.* v. *Pennsylvania Railroad, supra*, 736; *Gerhard & Hey, Inc.* v. *Cattaraugus & Co., supra;* Story on Bailments (8th ed.) §§ 501, 504, 410, 410a; Wigmore, *op cit., supra*, § 2508 and cases cited, as it did upon petitioner here when it alleged the breach of warranty as the basis of its claim. Petitioner apparently does not challenge the distinction which for more than two centuries since *Coggs* v. *Bernard, supra*, has been taken between common carriers and those whom the law leaves free to regulate their mutual rights and obligations by private arrangements suited to the special circumstances of cases like the present. Nor do we see any adequate grounds for departing from it now or for drawing distinctions between a private bailment of merchandise on a barge in New York harbor and of goods stored in a private warehouse on the docks. Neither bailee is an insurer of delivery of the merchandise; both are free to stipulate for such insurance or for any lesser obligation, in which case the bailor cannot recover without proof of its breach.

The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence, and in determining whether petitioner has sustained the burden the question often is, as in this case, what inferences of fact he may summon to his aid. In answering it in this, as in others where breach of duty is the issue, the law takes into account the relative opportunity of the parties to know the fact in issue and to account for the loss which it is alleged is due to the breach. Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee's liability, the law lays on him the duty to come forward with the information available to him. *The Northern Belle*, 9 Wall. 526, 529; *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 54 Fed. 481, 483; *Pacific Coast S. S. Co.* v. *Bancroft-Whitney Co.*, 94 Fed. 180; *The Nordhvalen, supra*, 886. If the bailee fails it leaves the trier of fact free to draw an inference unfavorable to him upon the bailor's establishing the unexplained failure to deliver the goods

safely. *Southern Ry.* v. *Prescott, supra;* cf. *The America*, 174 Fed. 724.

Whether we label this permissible inference with the equivocal term "presumption" or consider merely that it is a rational inference from the facts proven, it does no more than require the bailee, if he would avoid the inference, to go forward with evidence sufficient to persuade that the non-existence of the fact, which would otherwise be inferred, is as probable as its existence. It does not cause the burden of proof to shift, and if the bailee does go forward with evidence enough to raise doubts as to the validity of the inference, which the trier of fact is unable to resolve, the bailor does not sustain the burden of persuasion which upon the whole evidence remains upon him, where it rested at the start. *Southern Ry.* v. *Prescott, supra; Kahlsaat* v. *Parkersburg & M. Sand Co., supra; Tomkins C. S. Co.* v. *Bleakley T. Co.*, 40 F. (2d) 249; *Pickup* v. *Thames Insurance Co.*, 3 Q. B. D. 594. Cf. *Del Vecchio* v. *Bowers*, 296 U. S. 280; Wigmore, *op cit., supra*, §§ 2485, 2490, 2491, and cases cited.

Proof of the breach of warranty of seaworthiness stands on no different footing. The trier of fact may in many situations infer the breach from the unexplained circumstance that the vessel, whether a common or private carrier, sank in smooth water. See *The Edwin I. Morrison, supra; Work* v. *Leathers*, 97 U. S. 379, 380; *The Harper No. 145*, 42 F. (2d) 161; *The Jungshoved*, 290 Fed. 733; *Barnewall* v. *Church*, 1 Caines 217, 234; *Walsh* v. *Washington Marine Insurance Co.*, 32 N. Y. 427, 436; *Zillah Transportation Co.* v. *Aetna Ins. Co.*, 175 Minn. 398; and cases cited below, 114 F. (2d) 248, 251; Scrutton on Charter Parties and Bills of Lading (14th ed.) 105. Whether in such circumstances the vessel has the status of a private bailee is of significance only in determining whose is the burden of persuasion. Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve. *The Edwin I. Morrison, supra*, 212; *The Folmina, supra*, 363; *Schnell* v. *The Vallescura, supra*. The English courts, after some obscurity of treatment, see *Watson* v. *Clark*, 1 Dow 336, have reached the same conclusion. *Pickup* v. *Thames Insurance Co.*, 3 Q. B. D. 594; *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.*, [1901] A. C. 362, 366; *Lindsay* v. *Klein*, [1911] A. C. 194, 203, 205; see *Constantine S. S. Line* v. *Imperial Smelting Corp.*, [1941] 2 All. Eng. 165, 191-92.

Proof of the sinking of the barge aided petitioner, but did not relieve it from sustaining the burden of persuasion when all the evidence was in. This Court, in the case of private bailments, has given like effect to the rule that the unexplained failure of the bailee to return the bailed goods is prima facie evidence of his breach of duty. *Southern Ry.* v. *Prescott, supra,* 40, and cases cited; see *Chesapeake & Ohio Ry. Co.* v. *Thompson Mfg. Co.*, 270 U. S. 416, 422, and the lower federal courts have applied, correctly we think, the same rule with respect to proof of unseaworthiness by the shipper where the vessel has not assumed the obligation of a common carrier. *Kohlsaat* v. *Parkersburg & M. Grand Co., supra,* 285; *Robert A. Munroe Co.* v. *Chesapeake Lighterage Co.*, 283 Fed. 526; *The Nordhvalen, supra; Tomkins C. S. Co.* v. *Bleakley T. Co., supra; Delaware Dredging Co.* v. *Graham, supra,* 54. This is but a particular application of the doctrine of *res ipsa loquitur*, which similarly is an aid to the plaintiff in sustaining the burden of proving breach of the duty of due care but does not avoid the requirement that upon the whole case he must prove the breach by the preponderance of evidence. *Sweeney* v. *Erving*, 228 U. S. 233.

The Edwin I. Morrison calls for no different result. There this Court reversed the findings of the lower court on the ground that the explanation offered for damage to the cargo by seawater taken in through a defective bilge pump hole, was only a conjecture supported by no direct testimony and was not sufficient to sustain the burden of the shipowner to prove that the vessel was seaworthy, saying (p. 212): "If the determination of this question is left in doubt, that doubt must be resolved against" the shipowner. See *The Dunbritton*, 73 Fed. 352, 358; *The Alvena*, 74 Fed. 252, 255. The court below had found that the bill of lading signed by the master-owner undertook to deliver the shipment in "good order and condition", the "dangers of the sea excepted". No exception was taken to this finding and in this Court the shipper's contention that such was the contract was not challenged by the owner. The opinion must be taken as proceeding, as in *The Folmina* and *Schnell* v. *The Vallescura, supra,* on the ground that the case was one in which the obligation assumed was that of a common carrier on whom the burden rests of proving that the cargo loss is not due to unseaworthiness. The expressions in the opinion as to the burden of proof which the shipowner must carry in order to

bring him within the exception of perils of the sea, have been cited in the only instances when approved by this Court, as relating to the burden of proof on those who have assumed the obligations of common carriers. See *The Majestic*, *supra*, 386; *The Folming*, *supra*, 363; *Schnell* v. *The Vallescura*, *supra*, 305.

Here petitioner relied on the inference to be drawn from the unexplained sinking of the barge to sustain its burden of proving unseaworthiness. But the evidence did not stop there. To rebut the inference, respondent came forward with evidence fully disclosing the circumstances attending the sinking. Inspection of the barge before the loading began and after she sank, and again after she was raised, failed to disclose any persuasive evidence of unseaworthiness. The method and circumstances of her loading at least tended to weaken the inference which might otherwise have been drawn that the sinking was due to unseaworthiness rather than fault in stowing the cargo. Upon an examination of all the evidence of which the sinking, without any proven specific cause, was a part, the two courts below have found that no inference as to the cause of sinking can be drawn. Petitioner has thus failed to sustain the burden resting on it.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1941.

Commercial Molasses Corporation, Petitioner, *vs.* New York Tank Barge Corporation, as Chartered Owner of the Tank Barge "T. N. No. 73".	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 17, 1941.]

Mr. Justice Black, dissenting.

It has long been recognized that "courts of admiralty are not governed by the strict rules of the common law, but act upon enlarged principles of equity." *O'Brien* v. *Miller*, 168 U. S. 287, 297. Where, as here, the result of a case in admiralty is made to turn upon the distinction between a common and private carrier, one may well ask whether more respect has been paid to technical niceties of the common law than befits the admiralty tradition. Cf. *The Confiscation Cases*, 20 Wall. 92, 105-106, 107. I do not deny that in many situations the distinction may be important nor that legislatures and courts may be compelled from time to time to resurvey the changing line of separation. But here, I am convinced, the distinction is irrelevant to a just disposition of the case before us.

In the opinion just announced, the burden of proving seaworthiness is tied up with a common carrier's obligations as an insurer. But in *Schnell* v. *The Vallescura*, 293 U. S. 296, although the defendant was a common carrier on whom it was held such a burden lies, no suggestion that the Court rested its result upon the peculiar obligation of the defendant as an insurer can be found in the opinion. And so far as appears from the briefs and arguments of counsel as well as the majority opinion here, it would seem that this Court has never before given the insurer's liability of common carriers as the reason for the heavy burden of proof they bear in admiralty cases of this type. On the contrary, the basis usually given for the rule is the one explicitly stated in *Schnell* v. *The Vallescura*, *supra*, at page 304:

"The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability."

It is difficult to see any persuasive reason for concluding that the rule as thus explained is any less appropriately applied to private carriers than to common carriers. In both cases the shipper normally has no representative on board the ship, the master and crew being employees of the carrier, with the result that the difficulties encountered by the shipper in seeking to find out how the loss occurred are equally great. See Carver, *Carriage of Goods by Sea* (8th ed.) 9.

I have found no language in the opinions of this Court in cases holding the burden of proof of seaworthiness rests on a common carrier that even suggests, not to say compels, the inference that a different result would have been reached if the carrier had been a private one. Hence, if the question of this case were one of original impression, I should see no obstacle to a holding that would give to the shipper here, who clearly had no easier access to evidence than did the shipper in the *Vallescura* case, the benefits of a similar allocation of the burden of proof.

But the question is not one of original impression. In *The Edwin I. Morrison*, 153 U. S. 199, this Court held that the burden was on a *private* carrier to prove seaworthiness in a controversy distinguishable in no significant respect from that now before us. The opinion of the Court here has suggested that the finding by the Circuit Court in the *Morrison* case that the bill of lading stated that the carrier would deliver the shipment "in good order and condition" amounted to a finding that the carrier had by contract assumed additional obligations, *i.e.*, those of a common carrier. Hence, the Court sees in that decision nothing more than the reiteration of the proposition that a *common carrier* has the burden of proving seaworthiness and finds in it no indication of what the burden of a private carrier should be.

It may seriously be questioned whether the finding that the bill of lading contained the casual phrase just quoted can properly be interpreted as a finding of a contract to assume the peculiar lia-

bilities (whatever they may have been) of a common carrier. But even on the assumption that the Court's interpretation of the finding is correct, its interpretation of the basis of decision in the *Morrison* case seems clearly erroneous. Nowhere in that opinion is there the smallest suggestion that the carrier was regarded as having bargained itself into a position of special liability. If the Court had believed a distinction must be made between private and common carriers, I should suppose it would have been explicit in stating that this carrier, although a private carrier, had assumed the obligations of a common carrier by contract. I think it inconceivable that it would have left a fact of such significance to be deduced from an inconspicuous phrase in the findings of the Circuit Court set out in a footnote to the "Statement of the Case" seven pages before the opinion itself begins. *The Edwin I. Morrison*, *supra*, 265, n. 1.

In *The Lottawanna*, 21 Wall. 558, 571, Mr. Justice Bradley stated: "If . . . with the new lights that have been thrown upon the whole subject of maritime law and admiralty jurisdiction, a more rational view of the question demands an adverse ruling in order to preserve harmony and logical consistency in the general system, the court might, perhaps, if no evil consequences of a glaring character were likely to ensue, feel constrained to adopt it. But if no such necessity exists, we ought not to permit any considerations of mere expediency or love of scientific completeness, to draw us into a substantial change of the received law." In the "received law" of this Court, at least since 1894, when the *Morrison* case was decided, no distinction has been drawn between private and common carriers with reference to the burden of proving seaworthiness. If such a distinction had existed, the "new lights" shed by the awareness of ever increasing complexity in modern shipping, a complexity equally incomprehensible to the shipper whether he deals with a private or common carrier, could, perhaps not without propriety, have been taken by this Court as a reason for erasing it. But the contrary procedure, of establishing a distinction which neither was present in our received law nor is demanded "to preserve harmony and logical consistency", seems wholly unjustifiable.

Accordingly, it is my opinion that the judgment below should be reversed.

Mr. Justice DOUGLAS, Mr. Justice MURPHY, and Mr. Justice BYRNES concur in this opinion.